September 27, 2001

Mark Chevallier, Esq.
McGuire, Craddock & Strother, P.C.
3550 Lincoln Plaza
500 N. Akard St., Ste. 3550
Dallas, TX 75201

Via Facsimile and U.S. Mail
214/954-6868

Deirdre B. Ruckman, Esq.
Gardere Wynne Sewell, LLP
3000 Thanksgiving Tower
1601 Elm
Dallas, TX 75201

Via Facsimile and U.S. Mail
214/999-4667

Gerald P. Urbach, Esq.
Hiersche, Hayward, Drakely & Urbach, P.C.
15303 Dallas Parkway, Ste. 700
Addison, TX 75001

Via Facsimile and U.S. Mail
972/701-8765

RE: *In re Jobs.com, Inc.*, Case No. 01-41861-BJH-11

Dear Counsel:

As you know, the Court held a hearing on the Motion to Require Debtor to Assume or Reject Executory Contract (the "Motion") filed by John Carrieri, Anthony Carrieri, Louis Corbo, Kenneth Butkus, Steven Elliot, David Sergeant, Michael Slentz and Sean Slentz (collectively, "Movants") on August 2, 2001. At the conclusion of the hearing, the Court announced a partial ruling on the Motion.[1] This letter constitutes the Court's ruling with respect to the remaining issues raised in the Motion.

After careful consideration of the Motion, the Debtor's response, the evidence, and the arguments of counsel, the Court finds that the Statement of Designation, Preferences and Rights of Series C-1 Preferred Stock of Opportunity Network, Inc. (the "Statement") is not an executory

[1] On August 8, 2001, the Court signed a Limited Order on Motion to Require Debtor to Assume or Reject Executory Contract pursuant to which the Court concluded that the Merger Agreement was executed and fully consummated and thus, was not an executory contract. *See* Limited Order on Motion to Require Debtor to Assume or Reject Executory Contract, docket no. 84.

contract and therefore concludes that the balance of the Motion should be denied.[2] The Court's analysis is set forth below.

As part of the Merger Agreement that resulted in the Debtor's creation, the Debtor issued shares of Series C-1 preferred stock to Movants (the "Stock"), subject to the terms and conditions of the Statement. *See* Movants' Exhibits 7, 11. The Statement contained, among other things, a redemption provision requiring the Debtor to redeem the Stock under certain circumstances. *See* Movants' Exhibit 11 at p. 2 ¶ 5. Specifically, the Statement provided that "[a]t any time and from time to time after March 22, 2001, upon receipt of written demand from any holder of shares of Series C-1 Preferred, the Corporation, to the extent it has legally available funds therefore, shall redeem the whole or any part of such holder's shares. . . ." *See id.* at ¶ 5(a).

Movants made written demands for redemption on February 20, 2001. *See* Movant's Exhibits 27-30 and 32. The Debtor rejected these demands due to its belief that the requirements necessary for redemption had not been satisfied. *See* Movants' Exhibit 32 ("The Statement of Designation, Preferences and Rights of Series C-1 Preferred Stock sets forth the requirements that must be satisfied before a holder of Series C-1 Preferred Stock may exercise its redemption rights. It appears to jobs.com that you have failed to satisfy such requirements. As a consequence, we are returning your original February 20, 2001 letter to you, and the original stock certificate that you sent to us.").

The Debtor filed its voluntary petition under chapter 11 of the Bankruptcy Code (the "Code") on March 15, 2001, a few days before the March 22, 2001 date after which Movants could make demand on the Debtor for redemption of the Stock. In the Motion, Movants seek a determination that the Statement is an executory contract and request that the Court set a time by which the Debtor must assume or reject the Statement.

As an initial matter, the Court finds that it has jurisdiction to rule on the Motion pursuant to 28 U.S.C. §§ 157 and 1334, and that this is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A).

Section 365 of the Code provides that "the [Debtor-in-Possession], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *See* 11 U.S.C. § 365. The Code does not define the term "executory contract," but courts have found that the relevant inquiry for that determination is whether: (1) under the contract, performance remains due to some extent on both sides; and (2) the failure of either party to complete

[2] This letter specifically discusses only the Statement applicable to the Series C-1 preferred stock. The Merger Agreement also contained statements of designation, preferences and rights of Series C-2, C-3, and C-4 Preferred Stock, which statements detail the redemption price of the specific preferred stock, the date that demand can be made upon the Debtor for redemption, and the priority ranking of that preferred stock. While not specifically discussed, the Court's analysis and conclusion applies to each statement for each series of preferred stock.

performance would constitute a material breach of the contract, thereby excusing the performance of the other party. *See In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994) ("The Code does not define 'executory contract,' but both parties agree that the relevant inquiry is whether performance remains due to some extent on both sides. Courts applying § 365(a) have indicated that an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.") (citations omitted); *In re Placid Oil Co.*, 72 B.R. 135, 137-38 (Bankr. N.D. Tex. 1987) ("In analyzing contracts under Bankruptcy Code Section 365, courts have generally employed the Countryman definition of an executory contract, *i.e.* a contract under which the obligations of both the bankrupt and the other party remain so far unperformed that failure of either to complete performance would constitute a material breach excusing performance of the other.") (citations omitted). As noted in *In re Riodizio, Inc.*, 204 B.R. 417, 421 (Bankr. S.D.N.Y. 1997), "[u]nder Countryman's 'material breach' test, a prepetition contract is executory when both sides are still obligated to render substantial performance. Where such performance remains due on only one side, the contract is non-executory, and hence, neither assumable nor rejectable. The materiality of the breach is a question of state law. Thus, if applicable non-bankruptcy law permits either party to sue for breach because of the other part's failure to perform, the contract is executory." (citations omitted).

Movants contend that other courts have held that stock purchase and redemption agreements are executory contracts. Although there is some case law in support of Movants' contention, for the reasons discussed below, the Court concludes that these cases are not dispositive here. However, the Court begins by analyzing each of Movants' cases.

In *In re Parkwood Realty Corp.*, 157 B.R. 687, 689 (W.D. Wash. 1993), the court began its analysis by observing that it had been unable to find any case law directly on point. *See id.* ("While the Court has not been able to find any cases directly relating to stock repurchase agreements, those addressing real estate purchase options are pertinent."). The *Parkwood* court then analogized a stock repurchase agreement to a real estate option contract, concluding that upon the exercise of a real estate option, "substantial performance remains on both sides – conveyance of the property by the debtor and payment of the purchase price by [the other party]. A material breach would occur should either party refuse to complete the transaction after exercise." *Id.* at 690 (citing *In re A.J. Lane & Co., Inc.*, 107 B.R. 435 (Bankr. D. Mass. 1989)). The *Parkwood* court concluded that upon a corporation's decision to exercise its repurchase rights under a shareholders' agreement, the shareholder (there, the debtor) was required to turn over its stock, and the corporation was required to pay the purchase price. *See id.* at 690. The court found that the performance required on each side was sufficiently substantial that nonperformance by either party would excuse performance by the other, and that the contract was therefore executory. *See id.*

Another court, citing *Parkwood*, stated that "[s]hareholder agreements which impose, under certain circumstances, obligations on a shareholder to sell and ultimately on the corporation to buy shares are executory contracts." *In re Vecchitto*, 235 B.R. 231, 236 (Bankr. 1999), *aff'd* 229 F.3d 1136 (2nd Cir. 2000). In *Vecchitto*, the two shareholders of a corporate firm of licensed certified public accountants and that corporation entered into a shareholder agreement. Under that agreement, stock transfers were restricted in order to provide for an orderly disposition of the stock of any shareholder who voluntarily ceased to be an employee of the corporation. Specifically, the shareholder agreement granted each shareholder, upon the resignation, retirement, or other termination of employment by the other shareholder, an option to buy all or any part of the stock owned by the withdrawing shareholder at a preset formula. *See id.* At the end of the option period, the issuing corporation agreed to redeem all stock owned by the withdrawing shareholder that was not purchased by the other shareholder on the same terms. *See id.* The debtor (one of the shareholders) filed his chapter 7 case on June 14, 1993 and exempted $3,808.00 of the value of the stock in his case. The debtor continued to be employed by the corporation until September 1, 1996. The trustee sued the debtor and the corporation, claiming that substantial monies were due the estate under the terms of the shareholder agreement. The court found that the shareholder agreement was an executory contract that was rejected when the chapter 7 trustee did not move to assume it in a timely fashion; and therefore, the pricing formula set forth in the agreement did not apply. *Id.*

Finally, Movants cite *In re West Chestnut Realty of Haverford, Inc.*, 177 B.R. 501 (Bankr. E.D. Pa. 1995) in support of their contention that the Statement is an executory contract. There, a creditor sold certain real property to the debtor, financed in part by a stock option agreement which entitled the creditor to acquire an equity interest in the debtor. West Chestnut Realty filed its chapter 11 case and scheduled the stock option agreement as an executory contract. While the court did conclude that the stock option agreement was an executory contract, citing *Parkwood*, the debtor had admitted as much in its schedules.

For the reasons explained below, the Court does not need to decide if it agrees that stock redemption agreements, in general, are executory contracts that must be assumed or rejected by the debtor during its bankruptcy case. Here, the controlling issue is whether any substantial performance remains due from Movants after they exercise their option to have the Debtor redeem the Stock. Unless substantial performance is still due from Movants, and Movants' failure to perform the remaining obligations would constitute a material breach of the agreement excusing further performance from the Debtor, the Certificate is not an executory contract under the Countryman definition.

Along with a timely notice of their desire to have the Debtor redeem the Stock, Movants must tender the certificates representing their shares to the Debtor "duly endorsed or assigned to the Corporation or in blank." *See* Movant's Exhibit 11 at ¶ 5(b). Once Movants exercise their right to request redemption of the Stock owned by them by, in part, tendering their shares, they have no further obligations to perform. In executory contract parlance, no further performance is due from them. *See id*.

Unlike the facts here, under most real estate option contracts (the analogy relied upon by the *Parkwood* court), the holder of the option must first decide to exercise the option. Once the option is exercised, substantial performance is still required by both parties – *i.e*. the seller is required to convey good title to the real property and the purchaser is required to pay the agreed upon purchase price. If either party fails to perform its remaining obligation, a material breach would occur, excusing further performance by the other party.

Similarly, in *Vecchitto*, the shareholder agreement was found to be executory because upon the occurrence of the triggering event (*i.e*., the resignation or retirement of the employee /shareholder from the firm), substantial performance was still required on both sides – a tendering of shares to either the other shareholder or the corporation and the payment by one or both of those parties of the preset purchase price.

Finally, the prepetition option given to the creditor to purchase stock in the debtor in *West Chestnut Realty* still required, upon being triggered, material performance from both sides – the debtor was required to issue its shares and the creditor/purchaser was required to pay the purchase price.

Thus, unlike the facts in the cases relied upon by Movants, upon the occurrence of the triggering event here (the giving of notice and the return of the Stock certificates), there is nothing left for Movants to do. As a result, the Statement is not an executory contract under the Countryman definition.

A copy of the Court's Order denying the Motion is enclosed. This letter ruling and the Order were forwarded to the Clerk's office today for filing.

Sincerely,

Barbara J. Houser
United States Bankruptcy Judge

Enclosures